

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. B-1553
of Laidback Limousine Service,)
Omaha, seeking authority as a)
common carrier in Nebraska)
intrastate commerce in the)
transportation of passengers)
by limousine between points)
in Douglas County and between) DENIED
point in said county on the)
one hand, and, on the other hand,)
points within a 100-mile radius)
of Douglas County over irregular)
routes. RESTRICTION: The)
transportation of railroad)
train crews and their baggage is)
not authorized.) Entered: July 11, 2001

APPEARANCES:

For the Applicant:

William Gallup
1001 Farnam Street
Suite 300
Omaha, Nebraska

For the Protestants:

Marshall Becker
7901 Wakeley Plaza
Omaha, Nebraska

For the Commission:

Michael Loeffler
300 The Atrium
Lincoln, Nebraska

Patrick Sullivan
1246 Golden Gate Drive
Papillion, Nebraska

BY THE COMMISSION:

By Application filed March 1, 2001, Gary D. Bittner d/b/a Laidback Limousine Service("Laidback" or "Applicant"), Omaha, Nebraska, seeks authority as a common carrier in Nebraska intrastate commerce in the transportation of passengers by limousine between points in Douglas County and between points in said county on the one hand, and, on the other hand, points within a 100-mile radius of Douglas County over irregular routes. Notice of the application was published in the Daily Record, Omaha, Nebraska on March 6, 2001. Protests to the application were timely

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filed by Omaha Limousine Company, Happy Cab, Checker Cab and Yellow Cab, and Accent Limousine. A hearing on the application was held on May 11, 2001, by video in the Commission Library, with appearances as shown above.

E V I D E N C E

The applicant presented three witnesses who testified as follows:

Mr. Rusty Harmsen testified that as an associate in the restaurant business he is familiar with the need for limousines in the Old Market area in Omaha. Over the objection of the Protestants, Mr. Harmsen testified that in the past, he experienced difficulties in getting a limousine on short notice. Upon cross-examination by Mr. Becker, Mr. Harmsen testified that his testimony refers back to approximately two years ago when he was associated with Gallagher's, a restaurant in Omaha. He further testified that he had no knowledge as to whether the existing limousine services could meet the existing demand.

Mr. Robert Wolf had tried to obtain limousine service for his wedding last September. After several unsuccessful attempts he finally contracted with Star Limousine. Although he and his wife paid Star Limousine in advance, Star Limousine failed to show on his wedding day and his money was never refunded. He testified that he couldn't name the limousine companies he called in May to book limousine service in September, but he did call at least four or five.

The applicant, Gary Bittner testified that he currently owned Seal-Rite Insulation. He has approximately 35 employees working for him. He proposes to use three or four limousines in his business. He further testified that the financial information provided to the Commission accurately reflected his financial fitness to provision the proposed services. A stipulation was entered into prior to hearing as to the applicant's financial fitness. Mr. Bittner had inquired about the appropriate insurance policy and coverage and had received estimates from his insurance provider. He plans to run a second line into his business office at Seal-Rite Insulation, where calls will be picked up and drivers will be dispatched by one of his assistants. Mr. Bittner testified that he was unaware of the Commission's Motor Carrier rules and

regulations. He further testified that he had not thought about what rates he would like to charge in his business.

Mr. Bittner further testified that he began thinking about starting a limousine business when he heard about Star Limousine on television. He testified that he also had heard about the need for the proposed service from others in the community. Upon cross-examination, Mr. Bittner testified that he had not performed a market study. He testified that he gauged the need for the proposed service upon comments from people he had spoken with and from the coverage of Star Limousine on television.

Three witnesses presented testimony on behalf of the Protestants.

Mr. Thomas Schreckenberger, president of Accent Limousine (Accent), stated that he was thoroughly acquainted with the day to day operations of his company. To his knowledge, neither Mr. Harmsen, nor Mr. Wolf had called him for limousine service. He further testified that he would welcome new and additional business. Mr. Schreckenberger admitted that there are times in the year when Accent is completely booked including New Year's Eve and St. Patrick's Day. Admittedly, Accent is also busy during the wedding season. Mr. Schreckenberger testified that his business could not survive on just those days.

Upon questioning by Commissioner Landis, Mr. Schreckenberger testified that his company does not keep records of how many requests Accent turns down because of the availability of equipment. However, he did testify that turning down requests for service happens on a very infrequent basis and even if that does happen, he works with other limousine services in the area to provide the requested service.

Ms. Jodi Jones provided testimony on behalf of Old Market Limousine. She is the vice president and general manager. She testified that Old Market has eighteen limousines. She does not recall being called by Mr. Harmsen. She has experienced times when her entire fleet is in use, particularly during prom season and wedding season.

Mr. Gayle Townsend, of Omaha Limousine testified that he is the operations manager of the company. He is in charge of

scheduling drivers, answering the telephone, and scheduling all of the bookings. He answers the telephone 24 hours a day. Omaha Limousine operates four limousines. He testified that he does not need much advance notice since he has a large pool of drivers available to drive for him. Omaha Limousine does have cars sitting idle several hours of the day and is in the position to handle additional business. Mr. Townsend testified that the addition of another limousine service would definitely create a hindrance to its business. Mr. Townsend testified that there are times during the peak seasons where he turns down requests for service due to the unavailability of cars. However, Mr. Townsend also testified that Omaha Limousine's business could not survive on just the business generated during those peak times.

Upon questioning by Commissioner Landis, Mr. Townsend testified that the approval of this application would subject the market to further competition when the existing market has already been diluted. He testified that this would be true even if Omaha Limousine had the best service and rates in the Omaha area. He further testified that in his opinion, every limousine company would lose existing business and not just Omaha Limousine. Mr. Townsend further added that the new arena referred to in the applicant's testimony is not projected to be completed until 2003.

No further parties produced testimony or evidence at the hearing.

O P I N I O N S A N D F I N D I N G S

The granting of a certificate of public convenience and necessity is governed by Neb. Rev. Stat. § 75-311 (Reissue 1996) which states,

A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application of it is found after notice and hearing that (a) the applicant is fit, willing, and able properly to perform the service proposed...and (b) the proposed service, is to the extent to be authorized by the certificate, whether regular or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise the application shall be denied. Neb. Rev.

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Stat. §75-311(1) (Reissue 1996).

In other words, the Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing, and able." The second part of Neb. Rev. Stat. § 75-311 requires us to examine if the applicant demonstrated whether the proposed service is required by the present and future public convenience and necessity, commonly referred to as "need and necessity." The elements to a need and necessity finding were detailed by the Nebraska Supreme Court,

In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. *In Re Application of Kilthau*, 236 Neb. 811, 464 N.W.2d 162(1991).

Again, we must analyze whether or not the applicant has met the second prong of Neb. Rev. Stat. § 75-311 (1996 Reissue), under the facts presented. The issue of whether an applicant has met its burden of demonstrating that the proposed service is consistent with public convenience and necessity is ordinarily a factual issue. *In re Application of Nebraskaland Leasing & Assocs.* 254 Neb. 583, 578 N.W.2d 28 (1998). Although the applicant presented three witnesses, only one witness had actually been unsuccessful in obtaining a limousine within the past year. The testimony presented by the first witness was not probative of the current needs and demands of limousine service in Douglas County, but rather, focused solely on the demand two years prior. He further testified that he had no knowledge as to whether the existing limousine services could meet the existing demand.

Although the testimony of the second witness was very relevant to the need and necessity issue we are unable to indicate with the evidence taken as a whole whether this was one confined incident or whether the unavailability of limousine service is commonplace. There was no evidence presented that this witness had contacted any of the Protestants. Further, there was no clear testimony as to how many carriers he did in fact contact prior to contacting Star

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Limousine. Likewise, there was no evidence of whether there were any other carriers which could have fulfilled his need for limousine service. We therefore find that the applicant has not demonstrated that the operation will serve a useful purpose responsive to a public demand or need. *In re Application of Kilthau, supra.*

The testimony by the Protestants indicated that an increased demand can or will be served as well by the existing carriers. As was argued by the attorney for the Protestants, the existence of an adequate and satisfactory service is complete negation of public need and demand for added service by another carrier. *Id.*, at 816. Three witnesses testified that they routinely have vehicles and drivers sitting idle. With the exception of proms and certain holidays, the providers represented here can take on additional business. We therefore find that the applicant has not shown to the satisfaction of this Commission that the purpose proposed to be served by the applicant cannot or will not be served as well by existing carriers. Accordingly, we must find that the applicant fails the need and necessity requirements of § 75-311(1).



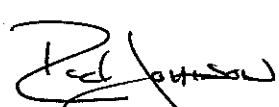
Because the Applicant has not met its burden with respect to the "need and necessity" requirement in Neb. Rev. Stat. § 75-311(1) (Reissue 1996), the Commission finds that the application should be denied.

O R D E R

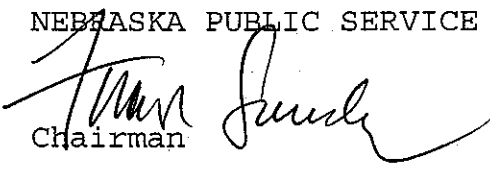
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1553 be, and it is hereby, denied.

MADE AND ENTERED in Lincoln, Nebraska on this 11th day of July, 2001.

COMMISSIONERS CONCURRING:




 //s//Frank E. Landis

NEBRASKA PUBLIC SERVICE COMMISSION


 Chairman

ATTEST:


 Executive Director